In forma pauperis
Petition not printed

31945 #2

IN THE MES-MU

Supreme Court of the United States

OCTOBER TERM, 1942

NO. 962

JOSEPH MESCALL,

Petitioner,

vs.

W. T. GRANT COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALAN W. BOYD,

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No. 962

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

A. Respondent had no duty to limit the hours of employment or to maintain a particular temperature.

(1) There was no limitation, either at common law or by the statutes of Ohio upon the number of hours of employment and no liability can be imposed upon an employer for injuries allegedly caused by long hours of work.

Lang v. *United States Reduction Co. (C. C. A. 7th C.)*, 110 Fed. (2d) 441, 443;
Tobin v. *Detroit T. & I. R. Co.*, 57 Ohio App. 306, 318;
Jackson v. *Cincinnati Gas & Electric Co. (Ohio Court of Appeals)*, 42 N. E. (2d) 218, 219;
Louisville & N. R. Co. v. Sawyers, 169 Ky. 671, 673, 674;
Swift & Co. v. *Rutkowski*, 167 Ill. 156, 159; 47 N. E. 362.

(2) The requirement that an employer furnish a safe place to work imposes no duty to maintain a uniform temperature in all parts of the place of employment.

Louisville & Nashville R. R. v. *Williams,* 165 Ky. 386, 390, 391;

B. The law of both Indiana and Ohio requires the Court to direct the verdict where not to do so would allow the jury to speculate and guess.

Hamden Lodge No. 517, I. O. O. F. v. *Ohio Fuel Gas Co.,* 127 Ohio State 469, 482;

Bond Stores, Inc. v. *Miller,* 49 Ohio App. 470, 477;

Bevan v. *New York, C. & St. L. R. Co.,* 132 Ohio State 245, 252;

Orey v. *Mutual Life Insurance Co. of New York,* 215 Ind. 305, 309, 310;

Pontiac-Chicago Motor Express Co. v. *George Cassons & Sons,* 109 Ind. App. 248, 252.

C. (1) In Indiana to invoke the doctrine of equitable estoppel the acts relied upon must be of an affirmative character and fraudulent.

Landers v. *Evers,* 107 Ind. App. 347, 349, 350;

Tinsley v. *Fruits,* 20 Ind. App. 534, 542;

(2) Estoppel can never arise from ambiguous facts but must be established by such as are unequivocal and not susceptible to two constructions; it must not rest in mere inference or argument:

Wilkerson v. *Wood*, 81 Ind. App. 248, 254;

Tinsley v. *Fruits*, 20 Ind. App. 534, 542;

Fletcher v. *Magill*, 110 Ind. 395, 404.

(3) Fraud will not be presumed but it must be proved by the party who alleges it.

Edwards v. *Hudson*, 214 Ind. 120, 122;

Wills v. *Mooney-Mueller Drug Co.*, 50 Ind. App. 193, 199;

Adams v. *Langel*, 144 Ind. 608, 612.

ARGUMENT

POINT A

The decision of the Circuit Court of Appeals holds that under the Section 871-15 of the Ohio Code the respondent's duty was to use "reasonable care—reasonable depending upon the danger attending the place—to eliminate defects in the *physical equipment used.*" It further held there was no statute in the State of Ohio specifically limiting the hours of employment and no known duty to maintain a uniform temperature. None of the cases cited by plaintiff under Point IV of the Petition (pp. 8-9) is incompatible with this opinion.

The case of *Ohio Automatic Sprinkler Co.* v. *Fender,* 108 Ohio State 149, was based upon the breach of Section 1027 of the Ohio Code (a section not here involved) which did impose a duty to guard dangerous machinery. Petitioner alleged the failure to furnish a particular safety device, as shown by the recent decision of *Jackson* v. *Cincinnati Gas & Electric Co.* (Court of Appeals of Ohio), 42 N. E. (2d) 218, where the Court said (p. 219):

> "There is no essential difference as far as the rule of evidence and procedure is involved between care required by the rules of common law and safety required by the statute. The case of Ohio Automatic Sprinkler Co. v. Fender, 108 Ohio St. 149, 141 N. E. 269, does not hold otherwise. This case dealt with the failure of an employer to provide a specific safety device required by statute. No latitude of comparison was involved. The device was either there or it was not. The statute was met with compliance or it was violated. Such is not the situation here. Had the statute under consideration in this

> case for example required an iron ladder and a wooden one had been used, there could be no occasion for the employment of the rule requiring evidence of comparative standards as to the use of wooden ladders. The statute would be violated and that would be the end of the matter. In the word 'safe' such latitude of comparison exists."

Baltimore & Ohio R. Co. v. *Groeger,* 266 U. S. 521, was a suit arising out of an employee's death due to an explosion of a boiler alleged to have been caused by a breach of the Federal Employer's Liability Act of 1908 and the Federal Boiler Inspection Act of 1911. It was based entirely upon alleged defects in the physical equipment in violation of the two statutes.

Likewise, *Jeffersonville Manufacturing Company* v. *Holden,* 180 Ind. 301, was based upon an alleged defect in the physical equipment in violation of an Indiana Statute requiring all machinery to be "properly guarded." Plaintiff's injury resulted from the employer's failure to furnish a guard which could have been applied without impairing the usefulness of the machine.

In harmony with the opinion of the Circuit Court of Appeals is the case of *Tobin* v. *Detroit T. & I. R. Co.,* 57 Ohio App. 306, where the Court held that the word "secure" as used in Title 45, Section 11, U. S. Code, 45 L.S.C.A. Sec. 11, which provides *inter alia,* that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards" refers only to mechanical and structural character of running boards and therefore it is not shown a running board is insecure by proof that frost has accumulated on it.

POINT B

In holding the circumstantial evidence insufficient to go to the jury on the question of causation petitioner asserts the opinion of the Circuit Court of Appeals is contrary to three Ohio decisions and therefore violates *Erie Railroad Co.* v. *Tompkins*. The cited Ohio decisions apply the so-called "scintilla" rule. The earliest of the three, *Ellis & Morton* v. *Ohio Life Insurance & Trust Co.*, 4 Ohio State 628, apparently was the origin of that rule in Ohio. All of these cases, *Ellis & Martin* vs. *Ohio Life Insurance & Trust Co.*, specifically, were overruled in the case of *Hamden Lodge No. 517, I.O.O.F.* vs. *Ohio Fuel Gas Co.* (1934), 127 Ohio State 469. In sustaining a directed verdict in that case the Court said (p. 252):

> "There was some evidence or rather some facts from which a slight inference of the necessary ownership or control might be drawn and if the so-called scintilla rule prevailed now in Ohio the trial court was right in submitting the question to the jury.
>
> * * * * *
>
> "But to say that the court must send the case to the jury whenever there is any evidence, no matter how slight, which tends to support a party's claim, is, in extreme cases, to permit the jury to play with shadowy and elusive inferences which the logical mind rejects. Before the judge is required to send the case to the jury, there should be in evidence something substantial from which a reasonable mind can draw a logical deduction.
>
> * * * * *
>
> "The second and third paragraphs of the syllabus in Ellis & Morton v. Ohio Life Insurance & Trust Co., supra, and the case of Clark v. McFarland, supra, are hereby overruled."

Commenting upon this rule in *Bond Stores, Inc.* vs. *Miller* (1935), 49 Ohio App. 470, the Court at page 477 said:

> "This distinction was not always clearly kept in mind by the courts, including even the Supreme Court, and for that reason the said court, in the case of Hamden Lodge v. Ohio Fuel Gas Co., 127 Ohio St. 469, 189 N.E. 246, decided to expressly abandon the scintilla rule and substitute therefor a rule which does permit both the trial and reviewing courts to weigh the evidence, whether of disputed facts or inferences, to the extent of determining whether the evidence in reference to the essential facts put in issue, and the reasonable inferences deducible therefrom, are such that, as fair-minded men, a jury should reasonably arrive at but one conclusion; and if the court so determines, and such conclusion is favorable to the defendant, the court is charged with the duty of rendering judgment in accordance with such determination."

The Supreme Court of Ohio in the similar case of *Bevan* v. *New York, C. & St. L. R. Co.*, 132 Ohio State 245, at page 252, quoted this Court as follows:

> "'"The case must be withdrawn from its (the jury's) consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."' Speculation and conjecture will not suffice. Gulf, M. & N. R. Co. v. Wells, 275 U.S. 455, 48 S. Ct. 151, 72 L. Ed. 370; Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819."

That the same rule is followed in Indiana is shown by the case of *Orey* v. *Mutual Life Insurance Co. of New York* (1939), 215 Ind. 305, cited by plaintiff. In that case the

plaintiff had the burden of proving the death of the assured had resulted from "violent external means." Doctors testified that the death could have been caused *only* by "violent external means." The Court said (p. 309-10).

> "In the instant case, if the testimony of the expert, who said that the hernia could have been caused by violent external means only, is eliminated, it leaves only the evidence that it might have been caused either by violent external injury, which might be assumed to have been accidental, or by an unusual strain, which might be assumed to have been the result of a voluntary act. The jury might infer that it was one or the other, but a determination without further evidence that it was one rather than the other would depend upon mere speculation or guess, and the trior of facts is not permitted to indulge in such inferences."

In *Pontiac-Chicago Motor Express Co.* v. *George Cassons & Sons* (1941), 109 Ind. App. 248, in affirming a judgment upon a directed verdict the Court said (p. 252):

> "Inferences to be drawn in favor of plaintiff by the trial court, in passing upon a motion to direct a verdict for the defendant, must be reasonable ones and not based on mere conjecture or speculation."

Likewise in harmony are the decisions of the Circuit Courts of Appeals cited by petitioner. All of these recognize the general proposition that a verdict cannot be based upon speculation and guess. For example, in the case of *Colonna* v. *Merchants Miners Transp. Co.* (1940), 112 Fed. (2d) 613, the Fourth Circuit Court of Appeals in affirming a verdict directed upon the same ground as here said:

> "Recoveries cannot be based upon pure surmise or mere guess. When a plaintiff seeks to recover

damages such recovery must be based upon some substantial evidence sufficient to support a verdict. The judge below properly directed a verdict for the defendant, under the evidence, and the judgment is accordingly affirmed."

Petitioner left the respondent's store on December 16, 1936. He later contracted pneumonia. Petitioner was undoubtedly exposed to many potential causes of pneumonia over which respondent had no control. His own physician who treated him at the time testified it would be purely guesswork on his part to attempt to determine the cause of petitioner's pneumonia. (R., p. 80.) The jury could have been in no better position than petitioner's physician.

POINT C

We agree that the law of Indiana applies as to the alleged estoppel and fraud theories.

In Indiana to invoke the doctrine of equitable estoppel the acts relied upon must be of an affirmative character and fraudulent.

Landers v. *Evers,* 107 Ind. App. 347, 349, 350;
Tinsley v. *Fruits,* 20 Ind. App. 534, 542.

Fraud itself is never presumed but must be proved by the party alleging it. The essential elements of actionable fraud in Indiana are representations, falsity, scienter, deception, and injury.

Edwards v. *Hudson,* 214 Ind. 120, 122;
Wills v. *Mooney-Mueller Drug Co.* (1911), 50 Ind. App. 193, 199;
Rochester Bridge Co. v. *McNeill* (1919), 188 Ind. 432, 439.

After leaving the respondent's store on December 16, 1936 the petitioner did not communicate with respondent until the letter of January 1, 1937, advising that his illness was worse "than anyone expected" and he would not return to work on January 4th as expected. (Stipulation Exhibit No. 1). Learning for the first time that petitioner would not be back on January 4th as expected, it advised petitioner by letter dated January 5, 1937 (Stipulation Exhibit No. 2): "Your salary will be paid from this office dating from Monday, January 4th." This was in accordance with respondent's practice of paying the salary of all trainees (such as petitioner) during illness—from the store until a replacement was made—from the New York office after a replacement was made. Thus the store was not charged with two salaries. (R. 245, 6, 253, 4.)

The only evidence concerning statements by the company with reference to the payment of petitioner's salary in addition to the letter of January 5th is the following statement attributed by petitioner to Boeve, Assistant Personnel Manager (R. 103):

> "There is no need to worry over money matters; your salary will be continued from this office."

Petitioner's theories of estoppel and fraud therefore depend entirely upon (1) the letter of January 5, 1937, (2) Boeve's statement, "There is no need to worry over money matters; your salary will be continued from this office," and (3) the fact that the salary was continued until after the statute of limitations had run and then was discontinued. Boeve's statement, like the letter, is explained by the company's policy with reference to payment of salary during illness.

Petitioner did not work from December 16, 1936 to March, 1937. (R., p. 62.) From March 20, 1937 to October 10, 1938, petitioner worked regularly and ostensibly had fully recovered from his illness until his foot began to bother him in October, 1938, when he went to Dr. Williams for a "check-up." (R., pp. 62, 63, 286.) He did not work from October 10, 1938 until December 12, 1938, when at his request and because he worried about his job he began to work part-time in Indianapolis. (R., pp. 72 and 76.) Respondent then allowed a reasonable time for petitioner to regain his health. After a few months had gone by and petitioner was still unable to do full work, Boeve went to Indianapolis to investigate. He conferred with petitioner's personal physician who advised him petitioner's condition would not improve. (R., p. 109.) Boeve then talked to petitioner and told him he should resign from the company and look around for a job where he would be off his feet entirely. (R., p. 109.) These facts fully explain why petitioner's employment and salary were terminated at the particular time that they were.

That petitioner himself was not misled is shown clearly by his own testimony. He admits being treated with absolute fairness. (R., p. 126.) He worried about his job and wrote letters to the company saying so (R., pp. 130-132), which he never would have done if he thought the company would pay his salary indefinitely or during disability. He resigned from the company (R., p. 81) without mentioning any claim against the company (R., p. 150). Even after leaving the employ of the company he never at any time mentioned a claim until two full years later when the complaint was filed. After consulting an attorney he filed a claim for compensation on April 27, 1940 (R., pp. 131-141),

which he never would have done if he felt he had a cause for damages of any kind. There was no evidence to support any of the above-mentioned elements of fraud.

CONCLUSION

The opinion of the Circuit Court of Appeals was correct and in all respects in conformity with applicable State law, and therefore in conformity with Erie Railroad v. Tompkins.

WHEREFORE, respondent respectfully submits the petition be denied.

ALAN W. BOYD,
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THOMAS M. SCANLON,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 962

JOSEPH MESCALL,

Petitioner-Appellant,

vs.

W. T. GRANT COMPANY, A CORPORATION,

Respondent-Appellee.

MOTION OF ELMER McCLAIN FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE with PROPOSED BRIEF

Of Counsel
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Toledo, Ohio.

IN THE

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To the Honorable Justices of the United States Supreme Court:

Elmer McClain moves that he be given leave, as an *amicus curiae*, to file his brief in the above entitled cause, now pending before this Court on a petition by the appellant for rehearing.

In support of this motion, applicant-for-leave would show:

He is a member of the bar of the State of Ohio and of this Court, for some time has been and now is engaged, in the State of Ohio, as legal counsel for organized work-

ers in said state numbering approximately 500,000, and in advising with respect to negotiation for, and enforcement, assertion and defense of rights of employees, fixed by law or contract.

This motion is made in good faith, without intent of delay and, to avoid delay, printed copies of the brief which the applicant desires leave to file are tendered herewith for filing on leave granted.

This case is now pending in this Court on the petition of appellant for rehearing on his petition for writ of certiorari denied May 24, 1943.

The questions which applicant seeks to brief arise on certain facts and holdings of the United States Circuit Court of Appeals for the Seventh Circuit, as stated and shown in its opinion rendered in this case January 25, 1943, and reported in 133 Fed. (2d) 209, particularly on the following facts and holdings:

Facts

Appellant while in the employ of the appellee in Columbus, Ohio, in November and December of 1936, worked in temperatures differing as much as 40 degrees, from 7:30 A. M. to 11:00 P. M. on week days and from 9:00 A. M. to 4:00 P. M. on Sundays, for a period of six weeks. The appellant suffered an illness and injury to health, beginning during such period, which he claimed resulted from the long hours and exposure to varying temperatures in appellee's store. Appellant relies on 103 Ohio Laws, p. 99, Section 15 (Throckmorton's Ohio Code, Baldwin's 1936 Edition, Section 871—15) to support his claim that appellee owed a duty to regulate hours

and temperatures in the interest of the health and welfare of employees.

Holdings Questioned

The opinion of the Circuit Court of Appeals held that the duty of the appellee to appellant under, or notwithstanding, the Ohio statute was limited to reasonable care to eliminate defects in the physical equipment used.

The applicant desires particularly to brief the following propositions:

(1) The law of Ohio referred to in the opinion (Section 871—15 Gen. Code Ohio, 103 Ohio Laws p. 99, Section 15) governed the appellee's duty, on the authority of Erie Railroad Co. vs. Tompkins 304 U. S. 64.

(2) Such Ohio law creates a duty commensurate with the scope of its language including a duty, not existing at common law in Ohio, for such regulation of hours with respect to the health and welfare of the employee and maintenance of such reasonable temperatures as the nature of the employment permits.

(3) Under the unreversed decision of the Supreme Court of Ohio, the Ohio statute is valid and effective notwithstanding general language by which it defines employer-duties.

(4) The Ohio law requires reasonable protection of the health and welfare of the employee not only against physical conditions which make a place unsafe but against anything in the employment which creates a risk to health and welfare.

The interest of the applicant and those whom he represents is not in the result of the litigation but is limited to the particular questions herein relating to the duty of the appellee as an employer in the State of Ohio.

The opinion stands as an authority on such questions, at least in the federal jurisdiction, is in direct conflict with the applicable law and cases cited and relied on in the proposed brief, destroys the force and effect of difficult and slow legislative gains in behalf of employees, not only in Ohio, but in numerous other states where similar general laws have been enacted, and further nullifies the effect of much litigation which ultimately resulted in judicial interpretation in Ohio and elsewhere sustaining the scope of protection contended for by the employees under such law and laws.

The importance of the decision in such respects is far-reaching and significant.

Respectfully submitted,

ELMER MCCLAIN.

STATE OF OHIO
COUNTY OF LUCAS
SS:

Elmer McClain, of Lima, Ohio, personally appeared before me, a notary public in and for said county and state and being duly sworn upon his oath deposes and says that the matters and things in the motion above set out are true in substance and in fact as he verily believes; done this ..... day of June, 1943.

Dorothy Tully,
Notary Public

My commission expires

January 19, 1946.

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OCTOBER TERM, 1942

No. 962

JOSEPH MESCALL,

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Respondent-Appellee.

BRIEF OF ELMER McCLAIN, AMICUS CURIAE

I.

Summary Statement

The suit is one at law, in which appellant's underlying claim is that of impairment of his health, by reason of excessive working hours and exposure to varying temperatures, when an employee in the appellee's store in Ohio. The written opinion involved is that of the United States Circuit Court of Appeals for the Seventh Circuit, reported in 133 Fed. (2d) 209.

II.

Statement of Facts

Facts considered in this brief are those stated in the opinion, showing the State of the employment, the na-

ture of the work, the hours and temperatures and beginning illness and, more particularly, that the employment was in Ohio, continued for a six weeks period during cold weather with working hours from 7:30 A. M. to 11:00 P. M. except on Sundays, when they were from 9:00 A. M. to 4:00 P. M., and a variation of temperatures in the appellant's working place of 40 degrees—from 82° to 42°. At the end of six weeks and while the plaintiff was so working, he became ill.

The appellant relied on Section 871—15 Throckmorton's Ohio Code (Baldwin's 1936 Edition); 103 Ohio Laws, p. 99, Section 15, in support of his claim that the hours or temperatures constituted a violation of the appellee's duty to the appellant under the Ohio law.

For brevity that Section is hereinafter referred to as the "Ohio Act". It is quoted,

> "Employer required to protect the life, health and safety of employees.—Every employer shall furnish *employment* which shall be *safe* for the employees therein, and shall furnish a *place of employment* which shall be *safe* for the employees therein, and for frequenters thereof, and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes, follow and obey orders and *prescribe hours of labor* reasonably adequate to render such *employment* and places of employment safe, and *shall do every other thing* reasonably necessary to protect the life, *health, safety* and *welfare* of such employees and frequenters."—103 Ohio Laws, p. 99, Section 15. (Emphasis mine)

III.

Question Raised

The following important question arises upon the opinion: Does the opinion violate the rule of Erie Railroad Co. vs. Tompkins, 304 U. S. 64, in holding, as it does,

that the Ohio Law imposed no duty on the employer except to provide a safe place of work and that such duty was limited to eliminating defects in physical equipment?

The opinion conflicts with Erie Railroad Co. vs. Tompkins 304 U. S. 64 for the reasons shown in the appellant's petition for writ of certiorari and brief thereon and for the reasons herein following.

IV.

Reasons Relied On

The reasons supporting the claim of conflict are:

1. The Ohio Act provides that the employer shall furnish employment which shall be safe, as well as a place of employment that is safe; shall not only furnish and use safety devices and safeguards, but shall prescribe reasonable hours of labor and do everything reasonably necessary to render such employment safe and to protect the health and welfare as well as safety of the worker. The same statute provides that "welfare" shall mean and include "comfort," decency and moral well-being and that the term "safe" and "safety" as applied to any employment or place of employment "shall mean such freedom from danger to life, health or welfare of employees as the nature of the employment will reasonably permit, including requirements as to the hours of labor with relation to the health and welfare of employees." General Code Ohio, Section 871—13 (10) (11); 103 Ohio Laws, pp. 98, 99, Section 13 (10) (11).

2. The limitation of the Ohio Act to protection against defective equipment and to provision for mechanically safe place of work, is in conflict with the decision of the Ohio Supreme Court in Ohio Automatic Sprinkler Co. vs. Fender, 108 Ohio St. 149, 141 N. E. 269, 277 (3), which holds that the general courses of con-

duct prescribed in the Ohio Act, and similar acts, are lawful requirements; that the Act is of unmistakable meaning and that its purpose is to carry out the beneficent spirit of industrial legislation made possible by the adoption of the Ohio Constitution in 1912.

3. The power to enact laws for the general welfare and to fix or regulate hours of labor of employees is specifically provided by the Ohio Constitution Section 34, Article II and that power, it is provided by the same section, shall not be limited or impaired by any other provision of the Constitution. The Circuit Court of Appeals' opinion would withdraw from the legislature the power to enact laws, or nullify laws of general provision, requiring the employer to conserve health in carrying out his industrial enterprise and to protect the health, strength and vitality of the worker. Ohio Automatic Sprinkler Co. vs. Fender, 108 Ohio St. 149, 141 N. E. 269, 277.

4. The Ohio Law for protection of health and rights of workers has been subject to much litigation in which the Supreme Court of Ohio consistently, after first applying a narrow and restrictive rule of interpretation of the purpose of the law in favor of the employer, has reversed such cases and declared the broad purpose to conserve and protect employees in accord with the conception and beneficent spirit of modern industrial legislation. Ohio Automatic Sprinkler Co. vs. Fender, 108 Ohio St. 149, 141 N. E. 269, 277, and Triff vs. National Bronze & Aluminum Co. 135 Ohio St. 191, 20 N. E. (2d) 232, 235, 238, (leading unreversed cases in which prior, contrary decisions are expressly overruled).

V.

Importance of the Question

The importance of the question here involved is by no means limited to the particular controversy between the appellant and the appellee. If the opinion of the Circuit Court of Appeals in the cases is sustained, not only will the Ohio Act and the decisions giving effect to the broader spirit and purpose of industrial legislation be set back and undone, but much other legislation of similar kind imposing duties in general language in the interest of the worker will be nullified and the progress in legislative purpose in the last few years looking to the protection of the worker's welfare will suffer a severely adverse impact.

VI.

Argument

A. The Ohio law governed the duty of appellee as an employer, Erie Railroad Co. vs. Tompkins, 304 U. S. 64.

B. The Ohio Act is clear in its provision for regulation of hours and doing other things reasonably necessary for protection of health and welfare.

The Ohio Act is not a restatement of the common law, under which no duty arose to regulate hours or provide for welfare or comfort, but the employee exercised a volition in accepting employment and assumed the known risks. Ohio Automatic Sprinkler Co. vs. Fender, 108 Ohio St. 149; Hauer vs. French Bros. Bauer Co. 43 Ohio App. 333 (3); Lang vs. United States Reduction Co. (CCA 7) 110 Fed. (2d) 441, 442, 443.

C. The power of the Ohio legislature to enact laws prescribing a general course of conduct for regulation

of hours, and protection of health and welfare was a valid power under the Ohio Constitution and was exercised lawfully by the Ohio Act. Section 34, Article II Ohio Constitution. Ohio Automatic Sprinkler Co., 108 Ohio St. 149.

D. Subsequent amendment of Section 35, Article II of the Ohio Constitution which gave the Industrial Commission power to award additional or punitive compensation when injury arose by violation of a law creating a duty in specific language did not alter the power of the legislature to enact laws providing for general course of conduct by employer, under the dominant Section 34, Article II of the Ohio Constitution. State ex rel. Stuber vs. Industrial Commission of Ohio, 127 Ohio St. 325, 188 N. E. 526; Section 34, Article II Ohio Constitution.

For the reasons and on the facts stated herein, and regardless of any other facts stated in the opinion of the Circuit Court of Appeals or the ultimate result of the litigation between the parties, the question here presented is of vital concern to the worker in Ohio and many other states having enactments prescribing a general course of conduct for employers.

Respectfully,

ELMER MCCLAIN, Amicus curiae.

Of Counsel

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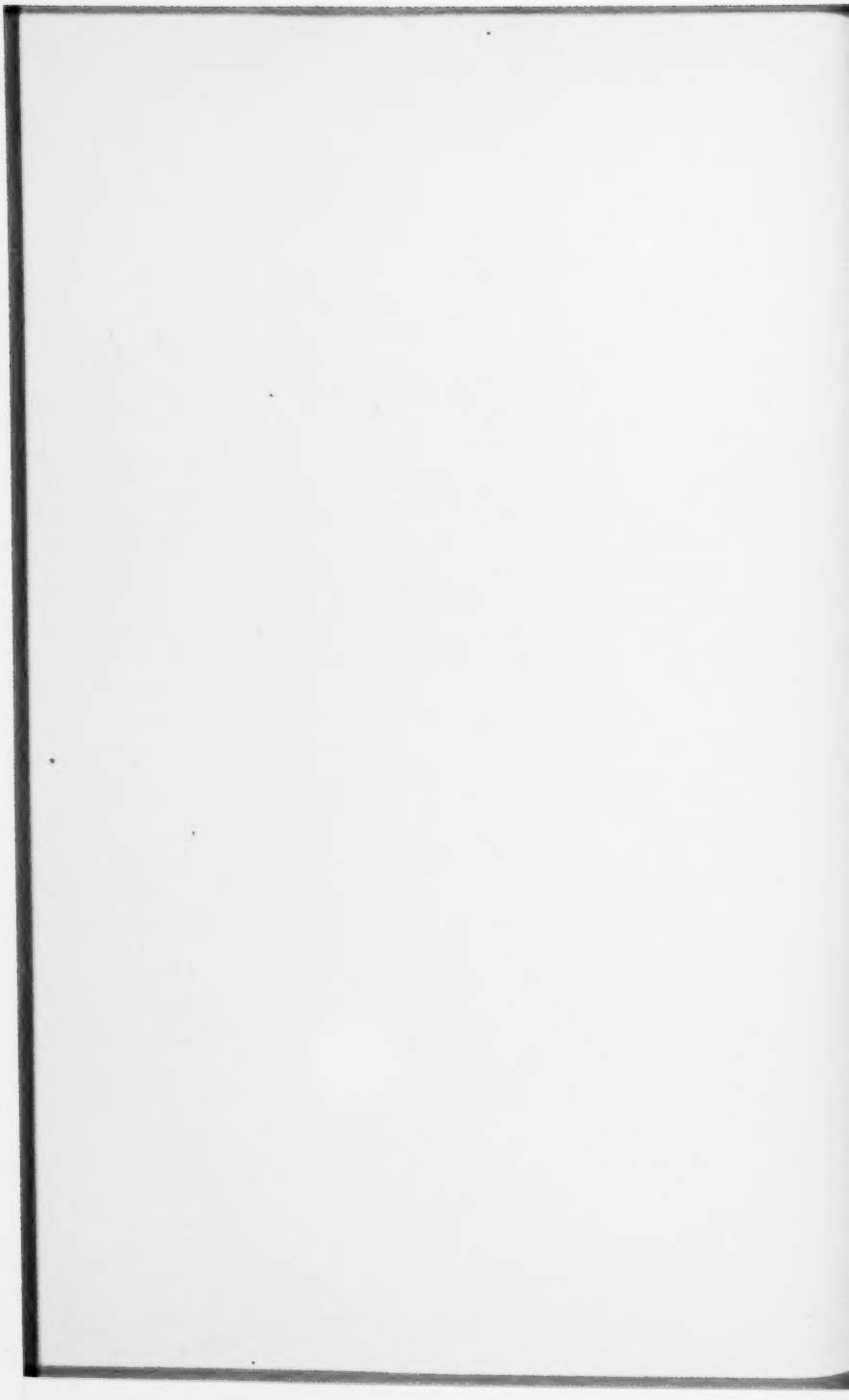
APPENDIX

Section 34, Article II Ohio Constitution (adopted Sept. 3, 1912).

> "Laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."

103 Ohio Laws, pp. 99, 100, Section 16.

> "Places of employment must be safe and provided with safety devices. No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees or frequenters."



(2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. 962

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Petitioner-Appellant,

vs.

W. T. Grant Company, a Corporation,
Respondent-Appellee.

PETITION OF JOSEPH MESCALL FOR [illegible]

AND BRIEF IN SUPPORT

THEREOF

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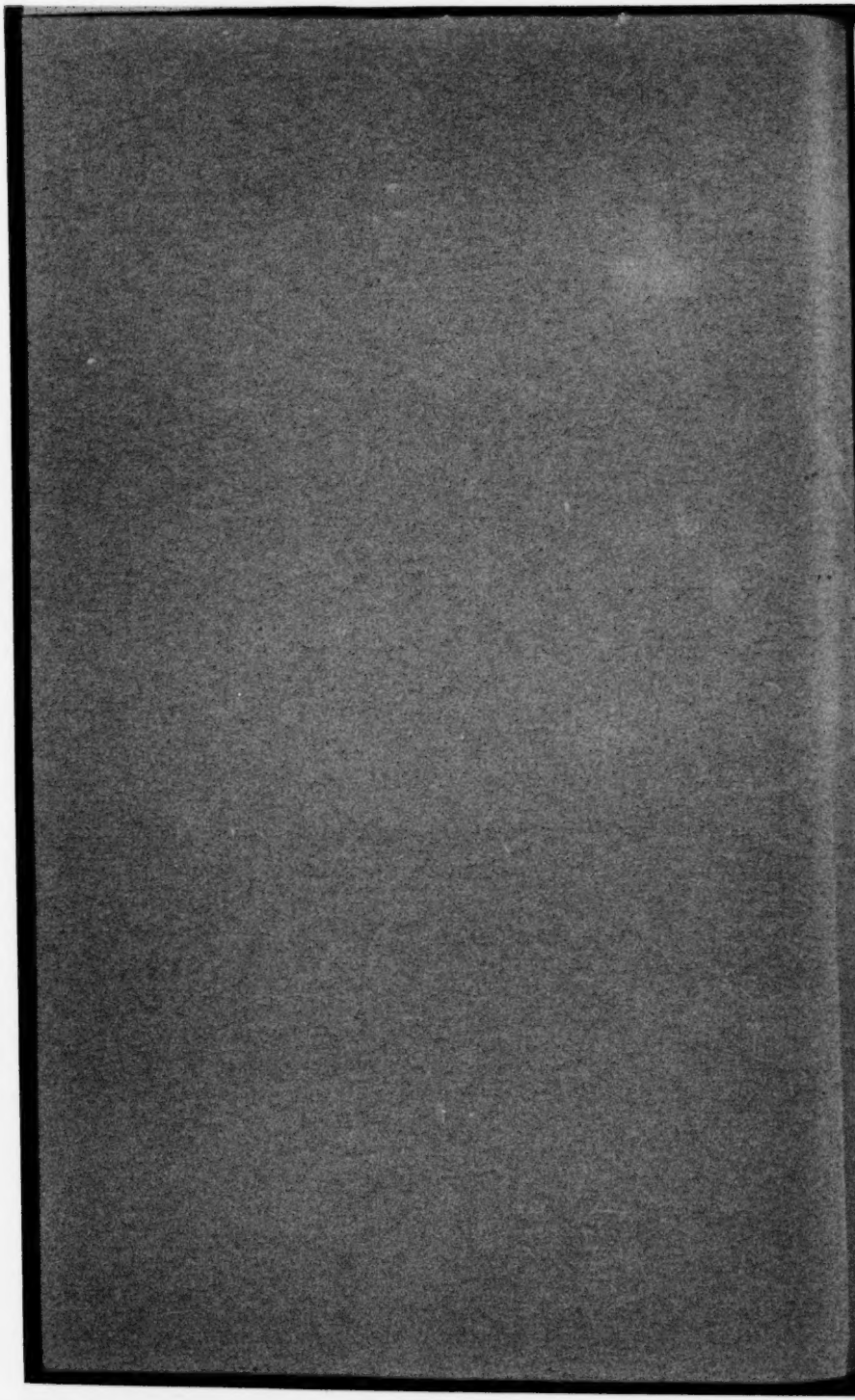
Indianapolis, Indiana

Of Counsel



SUBJECT INDEX

TABLE OF CASES

OHIO STATUTES AND CONSTITUTION

Sections 13, 15 and 16 Ohio Industrial Act are the same as Section 871 - 13, 871 - 15, 871 - 16 respectively of Throckmorton's Ohio Code (Baldwin' 1936 Edition), Sections 13, 15, 16 of 103 Ohio Laws, pp. 98-100.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 962

Joseph Mescall,
Petitioner-Appellant,

vs.

W. T. Grant Company, a Corporation,
Respondent-Appellee.

PETITION OF JOSEPH MESCALL

FOR REHEARING

To the Honorable Justices of the United States Supreme Court:

Comes now Joseph Mescall, petitioner for writ of certiorari in the above entitled cause and presents this, his petition for a rehearing of his petition to this Court for writ of certiorari, which was denied May 24, 1943, and, in support hereof, respectfully shows:

I

The opinion of the Court below, the United States Circuit Court of Appeals for the Seventh Circuit, which is reported in 133 Fed. (2d) 209, failed to apply the local, applicable law for determining the duty of the appellee as an employer in Ohio, and applied principles of common or other law in conflict with the Ohio law.

II

The question, whether the Federal Courts shall follow applicable state law, is inherently important, and the importance is increased in scope by the fact that many other states have similar laws which would be nullified or rendered inapplicable by the rule applied in the opinion of said Circuit Court of Appeals.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and, for reasons herein and therein, petitioner's petition for writ of certiorari likewise.

Respectfully submitted,

Clair McTurnan
Counsel for Petitioner

Certificate of Counsel

I, counsel for the above named Joseph Mescall, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Clair McTurnan

Respectfully submitted,

Clair Petersen
Counsel for Petitioner

Certificate of Counsel

I, counsel for the above named Joseph Vassell, do hereby certify that the foregoing petition for reduction is presented in good faith and not for delay.

Clair Petersen

IN THE

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OCTOBER TERM, 1942

No. 962

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Petitioner-Appellant,

vs.

W. T. Grant Company, a Corporation,
Respondent-Appellee.

PETITIONER'S BRIEF IN SUPPORT OF

PETITION FOR REHEARING

I.

Summary Statement of Matters Involved.

The suit is one at law and involves a question of the duty of the respondent to the petitioner who claimed to have been rendered susceptible to and caused to have pneumonia by reason of long hours of work and widely

varying temperatures, in respondent's store in Ohio. The complaint alleged in part:

> Paragraph 1. Petitioner "was required to work until 2 P. M. and to go into various parts of the defendant's building with temperature variations of 40 and more degrees, due to some defect or insufficiency in the heating system. As a consequence of such sudden changes of temperature and exposure to change of temperatures, the plaintiff was rendered susceptible to pneumonia, and was caused to contract pneumonia and phlebitis".
>
> Paragraph 4. Petitioner was "required by the defendant to work as late in the morning as 2 A. M. and a total of 18 hours or more a day, and during such time the defendant carelessly and negligently permitted or caused some parts of the store to be or become inadequately heated and cold and some hot, and required the plaintiff to go back and forth frequently from a warm part or parts to a cold part or parts and subject himself to exposure by reason of which the plaintiff was caused to and did contract pneumonia and was thereby caused to have phlebitis".
>
> (Complaint Paragraphs 1 and 4, R. 4 - 9).

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, reported in 133 Fed. (2d) 209, affirmed juegment, of the District Court below, for the respondent.

This petitioner's petition to this Court, for writ of certiorari, was denied May 24, 1943.

II.

Statement of Facts.

Petitioner was required to work, in the Ohio store, at least 15 hours a day each week day, 7 hours on Sundays, continuously for six weeks and in varying store temperatures ranging from 82 to 42 degrees. The heating system leaked (R.186); was supplemented in parts of the store, in other parts shut off, or nearly so; cold drafts were permitted, and none of such conditions cured (R.144) though complained of by employees (R.144,188). While so working, petitioner came down with chills and fever followed by pneumonia and, later, phlebitis. (R.86,87,91,92,93,144,166,169)

Petitioner, in support of his claim, relied on respondent's duty for protection of petitioner's health and welfare under the Ohio law.

Of such law, the opinion considered Section 871, 15 of Throckmorton's Ohio Code (Baldwin's 1936 Edition), 103 Ohio Laws, p.99,

Section 15, sometimes referred to as "Section 15 of the Ohio Industrial Act" which is:

> "Employer required to protect life, health and safety of employees. - Every employer shall furnish employment which shall be safe for the employees therein, and shall furnish a place of employment which shall be safe for the employees therein, and for frequenters thereof, and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes, follow and obey orders and prescribe hours of labor reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees and frequenters." (Emphasis mine)

The opinion held that the respondent owed a duty to provide a safe place to work, but that the application of this principle was limited to a duty of reasonable care to eliminate defects in physical equipment; and in considering hours and temperatures failed to apply the Ohio law, holding that it did not specifically limit hours or temperatures.

III.

Question Presented.

The following important question is presented: Is the law of the State of an employ-

er-employee relation the law governing the employer's duties regardless of where questions in respect of the duties may be adjudicated?

The particular questions as to duties of the respondent were:- Did the respondent have any duty except to eliminate defects in physical equipment? Did the failure of the Ohio law specifically to limit hours or specifically to provide for regulation of temperatures, render the law ineffective or inapplicable with respect to such subjects?

IV.

Reasons Relied on for Grant of Rehearing.

The opinion failed to apply the governing Ohio law and is for such reason in conflict with the decision of this Court in Erie Railroad Co. vs. Tompkins 304 U. S. 64. The opinion partially quoted Section 15 of the Industrial Act; held that the duty of the employer was limited to the elimination of defects in physical equipment; and that there was no Ohio law specifically prescribing or limiting hours or temperatures.

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The applicable Ohio law consisted of and involved: (a) Section 34, Article II of the Ohio Constitution, creating the power to pass laws regulating hours and providing for comfort, health and welfare of employees, and such power was, expressly, not subject to impairment or limitation by any other provision of the Constitution; (b) Section 15 of the Industrial Act, 103 Ohio Laws, p.99, (quoted in entirety post p.7) requiring that employer furnish and prescribe hours such as to render the employment and places of employment safe and do every other thing reasonably necessary to protect health and welfare; (c) a decision of the Ohio Supreme Court in Ohio Automatic Sprinkler Co. vs. Fender 108 Ohio State 149, holding Section 15 of the Ohio Industrial Act was a valid and effective exercise of the power conferred by Section 34, Article II of the Ohio Constitution, notwithstanding that it prescribed a general course of conduct by the employer, and was sufficient to cover specific duties within the general language. This decision reverses cases

to the contrary and is quoted in part with my emphasis:

> "It is to be observed in this connection that the Constitution of the state of Ohio provides that laws may be passed to provide for the safety of employes. Section 34, Art. 2, of the Ohio Constitution. This constitutional provision indicates that the paramount purpose in industrial legislation in this state is not payment for injuries, not the giving of money, which can never compensate for the loss of arms, eyes, health, or life, but reasonable protection for the health, strength and vitality of the worker.
>
> "It is self-evident that this purpose is nullified by holding too general to constitute lawful requirements statutes phrased as are sections 15 and 16 of the Industrial Commission Act" (103 Ohio Laws, pp.99,100, Sedtions 15 and 16) "and sections 12593 and 1027 of the General Code. If these and other similar statutes embodying general courses of conduct are not lawful requirements, so far as their enforcement is concerned, a great body of humane law is abrogated. * * * Because of the plain purpose and provisions of the Ohio Constitution, because of the unmistakable meaning of the statute, because of the weight of authority in the United States, and in order to carry out the beneficent spirit of the industrial legislation which was made possible by the adoption of the Constitution in 1912, a majority of the court hold that the doctrine announced in American Woodenware Co. v. Schorling, supra, Patten v. Aluminum Castings Co., supra, and Toledo Cooker Co. v. Sniegowski, supra," (Ohio cases holding an act must prescribe specific duties of employer to be lawful) "is not the law, and overrule those cases." - Ohio Automatic Sprinkler Co. v. Fender 108 Ohio State 149, 172,174.

The opinion of the Circuit Court of Appeals failed to give effect to the intent of the Ohio Constitution as to legislative power, to Section 15 of the Act and to the Ohio decision in that it limited the employer's duty to the elimination of defects in equipment, and refused to consider the requirements, for regulation of hours or the requirement for doing every other reasonably necessary thing, as applicable because they did not specifically limit hours or specify temperatures.

V.

Argument.

A. The declared liberal policy of the Ohio Constitution, Section 15 of the Ohio Industrial Act, and the decision of the Ohio Supreme Court, were the applicable governing law.

B. 1. The Industrial Act was valid and effective in its prescription of a general course of conduct, and was sufficient to impose all specific duties coming within the scope of its general language, Ohio Automatic Sprinkler Co.

vs. Fender 108 Ohio State 149, Baltimore & Ohio Railroad Co. vs. Groeger 266 U. S. 521.

2. The constitutionality and force of the provisions of the Ohio Industrial Act, relating to hours and other things affecting safety, health and welfare, were not affected by an amendment of Section 35, Article II, of the Ohio Constitution, permitting the Commission to assess penalties, in commission cases, where the employer had violated a specific requirement of law, State ex rel. Stuber vs. Industrial Commission of Ohio 127 Ohio State 235; Section 34, Article II Ohio Constitution.

C. The Ohio Industrial Act was not an enactment of the common law duties of employers; risk of hours or temperatures being not a matter of employers' duty but of employees' assumption, at common law. Section 16 of the Act; Lang vs. United States Reduction Co. (CCA 7) 110 Fed. (2d) 441.

D. Neither the record nor the Act limited employer's duty to eliminating defects in physical equipment.

E. The question of giving effect to applicable substantive law is not only important because of the constitutional element, but, when it involves employee health and welfare, and constitutional policy of the state, has additional importance, which is further increased where numerous states have similar general provisions for protection of employee welfare and a wide public interest is affected.

F. The particular question raised by this brief does not involve consideration as to whether the factual statements of the opinion, relating to other aspects of the case, constitute a correct or sufficiently full statement of facts supporting petitioner's claim. Petitioner's previous briefs in this Court have pointed out a few illustrations of conflict between opinion facts and clear record facts, and it is believed that the opinion may fairly be said, on the record, not to have noticed or attached significance to evidence which qualifies, explains, contradicts or gives wholly different import to, that stated in the opinion and to certain other most material uncon-

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7. The particular question raised by this brief does not involve consideration as to whether the factual statements of the opinion, relating to other aspects of the case, constitute a correct or sufficiently full statement of facts supporting petitioner's claim. Petitioner's previous briefs in this Court have pointed out a few illustrations of conflict between opinion facts and clear record facts, and it is believed that the opinion may fairly be said, on the record, not to have noticed or attached significance to evidence which qualifies, explains, contradicts or gives wholly different import to, that stated in the opinion and to certain other most material uncon-

tradicted evidence, all of which is believed to be more than sufficient to present sound fact questions for the jury.

Respectfully,

Clair McTurnan
Counsel for Petitioner

APPENDIX

"The terms "safe" and "safety" as applied to any employment or a place of employment, shall mean such freedom from danger to the life, health, safety or welfare of employees or frequenters as the nature of the employment will reasonably permit, including requirements as to the hours of labor with relation to the health and welfare of employees."
103 - Ohio Laws, p. 98, Section 13

"Places of employment must be safe and provided with safety devices. No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees or frequenters; and no such employer or other person shall hereafter construct or occupy or maintain any place of employment that is not safe." 103 Ohio Laws, p.99, Section 16.
- Ohio Industrial Act, Section 16.

"Laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power."
- Section 34, Article II Ohio Constitution.